Supreme Court, U.S.
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No. 98-1405

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

GORDON McCANN,

Petitioner,

v.

THE LARSON FOUNDATION,
a non-profit corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF ILLINOIS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Respondent objects to Questions Presented for Review in Petitioner's Writ of Certiorari. Neither the Trial Court, nor the Appellate Court proceeded to hear Defendant's Motion to Vacate, nor denied said Motion. The Trial Court heard and ruled upon Plaintiff's Motion to Dismiss Defendant's Motion to Vacate. Thus, Respondent objects to the Questions Presented in Petitioner's Writ as misstating what occurred in the proceedings below. Based on what did occur in the proceedings below, the following question is presented for review:

DID THE STATE COURT PROPERLY HEAR AND RULE UPON RESPONDENT LARSON FOUNDATION'S MOTION TO DISMISS PETITIONER'S MOTION TO VACATE ORDERS, WHICH MOTION TO DISMISS WAS NOTICED FOR HEARING ON SAID DATE?

STATUTORY PROVISIONS INVOLVED

Section 2-615 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615)

Section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401)

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STATEMENT OF CASE

In August 1997, defendant filed the Motion to Vacate, pursuant to Section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 1996)), and noticed the Motion for hearing in November 1997. In September 1997, plaintiff filed a Motion to Dismiss that Motion to Vacate, pursuant to Section 2-615 of the Code (735 ILCS 5/2-615 (West 1996)), claiming defendant failed to plead facts sufficient to show a meritorious defense and due diligence. Plaintiff's Motion to Dismiss was set for hearing on October 6, 1997, and notice was sent to Defendant. On October 6, 1997, the trial court conducted a hearing on Plaintiff's Motion to Dismiss, pursuant to notice, and subsequently entered a written order granting it. The Court found Defendant provided no facts that, if proven, would entitle him to relief on the basis of the trial court's lack of jurisdiction. Defendant argues that the trial court erred by dismissing his Motion to Vacate.

The Court ruled on the Motion to Dismiss, which Motion had been properly filed, served and noticed for hearing, as admitted by Petitioner in his Statement of Case, and did so correctly.

REASONS FOR DENYING THE WRIT

A Section 2-1401 Motion to Vacate Judgment (735 ILCS 5/2-1401 (West 1996)) may be challenged by a Motion to Dismiss under Section 2-615 of the Code (735 ILCS 5/2-615 (West 1996)) if the Section 2-1401 Motion fails to state a cause of action or if, on its face, it shows that petitioner is not entitled to relief. *Klein v. LaSalle National Bank,* 155 Ill.2d 201, 204, 613 N.E.2d 737,

739 (1993). A Section 2-615 Motion to Dismiss for failure to state a cause of action challenges only the legal sufficiency of a complaint and admits all well-pleaded facts. *Koffski v. Village of North Barrington,* 241 Ill.-App.3d 479, 485, 609 N.E.2d 364, 369 (2d Dist. 1993). It is directed toward defects that appear on the face of the pleading, and does not raise affirmative factual defenses. The question a Section 2-1401 Motion presents is whether it contains sufficient facts which, if proven, would entitle the movant to relief. *Storcz v. O'Donnell,* 256 Ill.App.3d 1064, 1069, 628 N.E.2d 677, 680-81 (1st Dist. 1993). Defendant's 2-1401 Motion did not contain such facts, and was properly dismissed.

ARGUMENT

I.

PETITIONER FAILS TO INDICATE SUFFICIENT REASONS WHY REVIEW BY THE SUPREME COURT IS WARRANTED IN THIS MATTER.

Supreme Court Rule 10 sets forth the character of reasons which will be considered by the Court in exercising its discretion in granting a Writ of Certiorari. The Petitioner herein provides no arguments of such character, which merits this Court to grant the Writ. Rather, the Petitioner's Writ contains inaccuracies and mischaracterizations in an effort to characterize the issue as one of procedural due process, when in fact, procedural due process was afforded Petitioner. The issue before the Trial Court, on proper notice, was a Motion to Dismiss based on the pleadings, which the Appellate Court reviewed appropriately.

II.
THE TRIAL COURT APPROPRIATELY RULED ON THE MOTION TO DISMISS, WHICH WAS DULY NOTICED AND ARGUED.

The Petitioner states in his Writ, as he did at the Appellate Court and Illinois Supreme Court, that procedural due process of law requires that there be an orderly consideration of motions which seek to challenge the validity of a pleading. However, the Defendant then wholly ignores that process is in fact what took place. As set forth in Respondent's Appellate Court brief and recognized in the Appellate Court's opinion, (at page 3) a Motion to Vacate is properly the subject of a Motion to Dismiss. *Glenn v. People*, 9 Ill.2d 335, 340, 137 N.E.2d 336 (1956). It is that Motion to Dismiss under Section 2-615 of the Illinois Code of Civil Procedure, which was noticed for hearing on October 6th. It is at that hearing the Court heard argument on the Motion to Dismiss and ruled. Thus, the Petitioner wholly mischaracterized the facts before the Trial Court and considered by the Appellate Court and Illinois Supreme Court concerning proper notice and argument. Certainly, there is no evidence of record, nor can there be, that the attorney for Respondent objected to the Trial Court proceeding to hear a motion which that Respondent had filed and noticed to be heard on that date.

III.
THE TRIAL COURT PROPERLY RULED ON THE MOTION TO DISMISS.

It is clear from the Motion to Vacate, and now is reiterated in Petitioner's Writ of Certiorari, that on the face of the pleadings, the Petitioner failed to exercise the option to purchase. Accepting the pleadings as true, Petitioner did not give written notice by certified mail.

That being the case, the Motion to Vacate failed to raise an issue of jurisdiction. The Appellate Court appropriately acknowledged Respondent's arguments made at the Trial Court, namely that despite Petitioner's characterization of his Motion as raising a jurisdictional issue, the mere assertion of that characterization does not make it true. In looking at the Motion to Vacate, it clearly did not sufficiently raise a jurisdictional issue in the Trial Court. The Appellate Court agreed. The Petitioner's Motion, despite his characterization, did nothing more than attempt to raise a meritorious defense. Therefore, the law requires that he also plead diligence in raising that defense. Petitioner pled neither a meritorious defense, nor diligence in his 2-1401 Motion and the Trial Court correctly ruled. *Klein v. LaSalle National Bank*, 155 Ill.2d 201, 204, 613 N.E.2d 737, 739 (1993).

CONCLUSION

Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,

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a non-profit corporation,
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By and through its attorneys:

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